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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DAVID ESPERANZA REYES, Defendant and Appellant.	B298586 (Los Angeles County Super. Ct. No.BA108837)

APPEAL from an order of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Amanda V. Lopez and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant David E. Reyes challenges the trial court's summary denial of his petition for resentencing under Penal Code section 1170.95.[1] Appellant argues that section 1170.95 gives rise to "special proceedings" in which the trial court "has only the power to determine whether the statutory requirements are met." From that premise, he contends that the trial court was required to appoint him counsel and afford him the opportunity to file additional briefing because his petition stated a prima facie case for relief. He further argues that the trial court erred by looking beyond the petition to information in the court file, and violated his constitutional rights to counsel and due process. We find no error and affirm.

BACKGROUND[2]

I. Underlying Conviction

The following evidence was adduced at appellant's murder trial. On the evening of July 18, 1995, two witnesses observed appellant interacting with his girlfriend, Avis Shevonne Roane, in the hallway of a Los Angeles apartment building. Appellant verbally insulted Roane and forced her into an apartment over her protests. Approximately ten minutes later, the witnesses left

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[1]All further statutory references are to the Penal Code unless otherwise indicated.

[2]Both parties have cited to our nonpublished opinion resolving appellant's direct appeal, *People v. Reyes* (Nov. 14, 1997, No. B104195) [nonpub. opn.]. Neither has properly requested judicial notice of the opinion. On our own motion, after providing the parties an opportunity to present information relevant to the propriety of taking judicial notice and the tenor thereof, we take judicial notice of the opinion and draw the background facts therefrom. (Evid. Code, §§ 452, subds. (a), (d), 459, subd. (a); Cal. Rules of Court, 8.1115(b).)

the apartment building to go to the store. On their way downstairs, they saw appellant and Roane in the stairwell. Appellant again verbally insulted Roane, punched her in the face twice with a closed fist, and ordered her to go upstairs.

Roane instead started to follow the witnesses downstairs. Appellant then grabbed Roane and pulled up her shirt, exposing her breasts, and pulled down her pants. Roane looked frightened and tried to go down the stairs, but appellant blocked her way. The witnesses watched appellant and Roane enter the stairway that led to the fourth floor. The witnesses then left the building.

When the witnesses returned about ten minutes later, they sat on a fourth-floor fire escape. About five minutes later, appellant came out to the fire escape and told them, "The dumb bitch jumped out the window." The witnesses saw Roane's body lying on the ground.

A police officer who responded to the apartment building found Roane lying on the ground and appellant holding her body. Appellant was not cooperative and appeared to be under the influence of alcohol or narcotics. The officer went to appellant's fourth floor apartment, where he found blood smears and a broken television facedown on the floor. The officer interviewed appellant's neighbor, who said that he "heard the guy next door beating the shit out of his girlfriend, [and] he could hear the walls knocking." The neighbor later denied making that statement.

The medical examiner who performed the autopsy on Roane found two types of injuries on her body: one set of injuries was consistent with a fall from the window, and the other was consistent with her being grabbed and choked. The medical examiner opined that Roane was alive and possibly unconscious

when she went out the window, and fell with her back facing the ground. The immediate cause of her death was a head injury.

Appellant introduced evidence that the witnesses had been drinking on the day of the incident. He also testified that Roane had a history of erratic behavior and occasionally hit herself against the wall. On the day of the incident, Roane wanted to take a walk but appellant wanted to stay in and watch a movie. Roane became angry and threw items at appellant and threw his beer out the window before leaving the apartment. Appellant took her back into the apartment; he conceded that he pulled down her pants in the process. Once back in the apartment, Roane knocked over the television and began hitting herself against the wall. Appellant tried to stop her by embracing her but had limited success. When appellant left Roane to go lock the apartment door, he heard a crash and saw her going out the window. An expert in psychiatry testified that Roane suffered from schizoaffective disorder and depressive moods and had a greater than one-in-six chance of committing suicide.

A jury convicted appellant of second degree murder. (§§ 187, subd. (a), 189 subds. (a) & (b).) We affirmed his conviction on direct appeal. As relevant here, we determined that the record "discloses sufficient evidence to support a conviction of second degree murder. There was credible testimony that prior to Roane's death, appellant struck Roane and terrified her. Blood was found throughout appellant's apartment, and there were signs of a struggle. Finally, there was expert testimony that Roane may have been unconscious when she fell out the window, and that Roane's injuries were consistent with her having been choked and pushed from the apartment window."

II. Petition for Resentencing

In 2018, the Legislature enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), which "amend[ed] the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1(f).) In addition to other amendments discussed more fully below, SB 1437 added section 1170.95, which establishes a procedure by which individuals convicted of murder under a felony murder theory or the natural and probable consequences doctrine can seek vacation of those convictions and resentencing. (Stats. 2018, ch. 1015, § 4, pp. 6675-6677; see also *People v. Lewis* (2020) 43 Cal.App.5th 1128, 1134, review granted March 18, 2020, No. S260598 (*Lewis*).)[3] The provisions of SB 1437 became effective on January 1, 2019.

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[3]The Supreme Court granted review in *Lewis* to consider two issues: "(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)." (*Lewis*, *supra*, S260598) [2020 WL 1291847].) The Supreme Court also granted review in *People v. Cornelius* (2020) 44 Cal.App.5th 54, review granted March 18, 2020, No. S260410 (*Cornelius*) and *People v. Verdugo* (2020) 44 Cal.App.5th 320, review granted March 18, 2020, No. S260493 (*Verdugo*). The Court deferred briefing in *Cornelius* and *Verdugo* pending its consideration and disposition of *Lewis* or further order. (*Cornelius*, *supra*, S260410; *Verdugo*, *supra*, S260493.)

On April 4, 2019, appellant, in propria persona, filed a petition asking the court to vacate his murder conviction and resentence him pursuant to section 1170.95. On the form petition, appellant checked a box affirming the statement, "A complaint, information, or indictment was filed against me that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine." Appellant also checked boxes affirming statements asserting, "At trial, I was convicted of 1st or 2nd degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine," "I could not now be convicted of 1st or 2nd degree murder because of changes to Penal Code §§ 188 and 189, effective January 1, 2019," "I was convicted of 2nd degree murder under the natural and probable consequences doctrine or under the 2nd degree felony murder doctrine and I could not now be convicted of murder because of changes to Penal Code § 188, effective January 1, 2019," and "I request this court appoint counsel for me during this re-sentencing process."

Appellant also checked several boxes affirming statements applicable only to petitioners seeking resentencing for convictions of first degree felony murder: "I was not the actual killer," "I was not a major participant in the felony or I did not act with reckless indifference to human life during the course of the crime or felony," and "The victim of the murder was not a peace officer in the performance of his or her duties, or I was not aware that the victim was a peace officer in the performance of his or her duties and the circumstances were such that I should not reasonably have been aware that the victim was a peace officer in the performance of his or her duties." In addition, he checked the box asserting, "There has been a prior determination by a court or

jury that I was not a major participant and/or did not act with reckless indifference to human life under Penal Code § 190.2(d). Therefore, I am entitled to be re-sentenced pursuant to § 1170.95(d)(2)."

The trial court denied appellant's petition on April 15, 2019 without appointing counsel or holding a hearing on the petition. The court issued a minute order stating: "Petition pursuant to Penal Code section 1170.95, filed April 4, 2019, read and considered. Petitioner was convicted of second degree murder on June 25, 1996. The conviction was affirmed on November 14, 1997. Pursuant to the case file, the jury was never instructed on first degree murder. The jury rejected the lesser included offense of involuntary manslaughter. [¶] Petitioner was convicted as the perpetrator in the crime. Instructions on aiding and abetting or felony murder were not given. The only mental state instructed was malice aforethought, express and implied. As such, petitioner is not entitled to relief under Penal Code section 1170.95. [¶] Petition denied."

Appellant timely appealed.

DISCUSSION

I. Legal Principles

The primary purpose of SB 1437 is to align a person's culpability for murder with his or her own actions and subjective mens rea. (See Stats. 2018, ch. 1015, § 1, subd. (g).) To effectuate that purpose, SB 1437 amended sections 188 and 189. As amended, section 188, subdivision (a)(3) now provides that "in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."

(§ 188, subd. (a)(3).) Section 189 now provides that a participant in qualifying felonies during which a death occurs generally will not be liable for murder unless that person was (1) "the actual killer," (2) a direct aider and abettor in first degree murder, or (3) "a major participant in the underlying felony [who] acted with reckless indifference to human life." (§ 189, subd. (e).)[4]

SB 1437 also added section 1170.95 to the Penal Code. Section 1170.95 permits a person convicted of murder on a charging document that allowed the prosecution to argue felony murder or the natural and probable consequences doctrine to petition the sentencing court to vacate the conviction and resentence on any remaining counts if the person could not be convicted of murder under sections 188 and 189 as amended by SB 1437. (§ 1170.95, subd. (a).) A petition for relief under section 1170.95 must include: "(A) A declaration by the petitioner that he or she is eligible for relief under this section, based on all the requirements of subdivision (a). [¶] (B) The superior court case number and year of the petitioner's conviction. [¶] (C) Whether the petitioner requests the appointment of counsel." (§ 1170.95, subd. (b)(1).) If any of this information is missing "and cannot be readily ascertained by the court," the court may deny the petition without prejudice. (§ 1170.95, subd. (b)(2).)

If the petition contains the required information, section 1170.95, subdivision (c) prescribes "a two-step process" for the court to determine if it should issue an order to show cause.

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[4]This limitation does not apply "when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties." (§ 189, subd. (f).)

(*Verdugo*, *supra*, 44 Cal.App.5th at p. 327.) First, the court must "review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section." (§ 1170.95, subd. (c).) If the petitioner has made this initial prima facie showing, he or she is then entitled to appointed counsel, if requested. (*Ibid.*; *Verdugo*, *supra*, at p. 328; *Lewis*, *supra*, 43 Cal.App.5th at p. 1140.) The prosecutor must file a response, and the petitioner may file a reply. (§ 1170.95, subd. (c).) The court then reviews the petition a second time. If, in light of the parties' briefing, it concludes the petitioner has made a prima facie showing that he or she is entitled to relief, it must issue an order to show cause. (*Ibid.*; *Verdugo*, at p. 328; *Lewis*, at p. 1140.)

"Once the order to show cause issues, the court must hold a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts." (*Verdugo*, *supra*, 44 Cal.App.5th at 327, citing § 1170.95, subd. (d)(1).) At the hearing, the parties may rely on the record of conviction or present "new or additional evidence" to support their positions. (§ 1170.95, subd. (d)(3).)

We independently review whether the trial court properly interpreted and fulfilled its duty under the statute. (See *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 287 [questions of law are reviewed de novo]; cf. *Verdugo*, *supra*, 44 Cal.App.5th at p. 328, fn. 8 [appellate court's principal task in interpreting a statute is to determine Legislative intent and give effect to the law's purpose].)

II. Analysis

Appellant contends that section 1170.95 gives rise to "special proceedings" in which a trial court "has only the power to

determine whether the statutory requirements are met." His position is that the trial court must accept as true the allegations in a section 1170.95 petition, and has a ministerial duty to appoint counsel, issue the order to show cause, and conduct a hearing if the allegations meet the criteria of section 1170.95, subdivisions (a) and (b). In other words, "if the petition alleges facts that, if true, entitle the petitioner to resentencing, then the trial court 'shall issue an order to show cause' and 'shall appoint counsel to represent the petitioner.'" Implicit in this argument is that the trial court may not, as it did here, consult materials that may contradict the petition's allegations.

Every Court of Appeal to have considered the issue has held that in determining whether a petitioner has made a prima facie case for relief under section 1170.95, a trial court may look to documents that are part of the record of conviction or are otherwise in the court file. (See *Verdugo*, *supra*, 44 Cal.App.5th at 329 [documents in court file or record of conviction should be available to trial court in connection with first prima facie determination under subd. (c)]; *Lewis*, *supra*, 43 Cal.App.5th at 1138 [trial court may summarily deny petition without briefing or appointment of counsel if court file shows petitioner was convicted of murder without instruction or argument based on felony-murder rule or natural and probable consequences doctrine]; *Cornelius*, *supra*, 44 Cal.App.5th at pp. 57-58 [affirming summary denial of petition based on verdict, trial transcript, and prior appeal].) We agree with the analyses of our sister courts and reject appellant's contention that these cases were wrongly decided.

In *Verdugo*, the Court of Appeal observed that section 1170.95, subdivision (b)(2) allows a court to consider readily

ascertainable documents that are in the court file or otherwise part of the record of conviction to ensure the petition meets the requirements of subdivision (b)(1). (*Verdugo*, *supra*, 44 Cal.App.5th at p. 329.) It reasoned that those same documents "should similarly be available to the court in connection with the first prima facie determination required by subdivision (c)." (*Ibid.*) We agree. A trial court evaluating whether a petitioner has made a prima facie showing in a section 1170.95 petition is not required to accept his or her allegations at face value, and may also examine the record of conviction. (*Lewis*, *supra*, 43 Cal.App.5th at p. 1138; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 329-330.) However, the contents of the record of conviction defeat a prima facie showing only when the record "show[s] as a matter of law that the petitioner is not eligible for relief." *(Lewis*, at p. 1138; *Verdugo*, at p. 330; see also *Cornelius*, *supra*, 44 Cal.App.5th at p. 58.)

Following *Verdugo*, *Lewis*, and *Cornelius*, we look to the record of conviction in the case to evaluate appellant's petition. It indicates that appellant was the sole principal and was found to have acted with malice aforethought. No facts support application of the felony murder theory or the natural and probable consequences doctrine. Appellant was tried as the sole direct perpetrator; there is no indication, even from his own testimony, that he may have aided and abetted another perpetrator. (See *People v. Chiu* (2014) 59 Cal.4th 155, 165-166.) The trial court correctly concluded that appellant is ineligible for relief under section 1170.95 as a matter of law.

Appellant also claims he was entitled to appointed counsel without regard to the veracity of his allegations. We reject his assertion. Section 1170.95 does not mandate the appointment of

counsel during the initial "screening" phase, but only after the trial court has determined the petition sets forth a prima facie case. (See *Lewis*, *supra*, 43 Cal.App.5th at p. 1140; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 332-333; *Cornelius*, *supra*, 44 Cal.App.5th at p. 58 [rejecting claim that petitioner was entitled to appointed counsel where he was indisputably ineligible for relief under section 1170.95].)

We further reject appellant's assertion that the trial court's summary denial of his petition violated his federal constitutional right to counsel under the Sixth Amendment. Appellant had no constitutional right to counsel at this stage of a section 1170.95 proceeding. The retroactive relief afforded by section 1170.95 reflects an act of lenity by the Legislature and is not subject to Sixth Amendment analysis. (Cf. *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1156 [no right to jury trial in proceedings under SB 1437 because its retroactive relief is "an act of lenity that does not implicate defendants' Sixth Amendment rights"], citing *People v. Perez* (2018) 4 Cal.5th 1055, 1063-1064; *Pennsylvania v. Finley* (1987) 481 U.S. 551, 555 [prisoners have no constitutional right to counsel "when mounting collateral attacks upon their convictions"].)

Finally, appellant claims that the summary denial of his petition violated his procedural due process rights because it deprived him of procedures to which he was entitled under section 1170.95. As discussed above, however, the trial court acted in accordance with section 1170.95's procedures when it consulted the court file and summarily denied appellant's petition. Appellant has therefore suffered no due process violation.

DISPOSITION

The order denying appellant's petition under section 1170.95 is affirmed.

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COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.